Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

STUART H. SMITH, JR.

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTION PRESENTED FOR REVIEW

I.

Was the Court of Appeals in error in affirming the Judgment of the District Court in denying petitioner's Motion to Set Aside a Judgment for Fraud upon the Court under Rule 60 (b) of the Federal Rules of Civil Procedure where the true condition and operational status of the vessel's mechanical equipment were concealed by counsel and engineering supervisory personnel.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit in STUART SMITH, JR. VS. WATERMAN STEAMSHIP CORPORATION, 00-CV-1878, (B), is set forth in the Appendix hereto.

The Memorandum of Decision of the District Court for the Eastern District of Louisiana in STUART SMITH, JR. VS. WATERMAN STEAMSHIP CORPORATION bearing number 00-1878 (I) (B) (5) is set forth in the Appendix hereto.

STATEMENT OF THE BASIS FOR JURISDICTION

The final Judgment of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the District Court for the Eastern District of Louisiana, was entered on January 3, 2002. This Petition for Writ of Certiorari is filed within ninety (90) days of that date. 28 U.S.C. Section 2101 (c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254 (1)

STATEMENT OF THE CASE

On June 10, 1992, Petitioner, STUART H. SMITH, JR., joined the STONEWALL JACKSON, as a member of the crew, in the Port of New Orleans, Louisiana.

The STONEWALL JACKSON is an oceangoing cargo vessel owned and operated by Waterman Steamship Corporation. The STONEWALL JACKSON is propelled by a high pressure steam turbine. Steam generated by the ship's boilers drives the turbine geared to the propeller shaft. The steam enters the turbine through a throttle valve and impinges on the rotor blades which impart movement to the rotor, and through a series of reduction gears causes the propeller shaft to rotate.

The turbine consists of ahead and astern elements, used alternately to move the ship forward or astern. The propeller is reversed by closing the ahead throttle valve and opening the astern throttle valve to permit the steam to enter the astern element. With the astern valve opened and the ahead valve closed, the propeller reverses direction and the ship's forward movement is arrested. If while moving astern, ahead motion or a reduction in astern motion is desired, the operation is reversed.

SMITH joined the ship as a licensed officer on June 10, 1992 at the commencement of Voyage No. 67. Voyage 67 terminated on September 29, 1992 and Voyage 68 commenced on October 30, 1992.

On October 3, 1992, STONEWALL JACKSON was berthed in the Mississippi River in New Orleans. At 12:05 p.m., the vessel left her berth to proceed on her voyage. SMITH was assigned on the vessel's stern as the mooring lines were let go and the ship was moved away from the dock. SMITH was instructed by the Master to estimate and report distances from the ship to the wharf as the STONEWALL JACKSON, approximately 900 feet in length, turned to head down river.

As the ship began to turn, SMITH was required to proceed from the starboard cantilever to the stern, across the stern, and then to end of the port cantilever, a distance of 60 yards in order to be in a position to report distance estimates. As the ship was 90 degrees to the course of the river, the

closest point of the ship to the wharf was 250 feet, with her stern to the wharf.

For reasons never clearly determined, the ship backed into the wharf causing damage of approximately $150,000.00.

Subsequent to the allision, the Coast Guard Form 2692 was completed by the owner's representative and an investigation conducted by the Coast Guard Marine Safety Office. The report was prepared by an attorney representing Waterman, on the basis of information from sources never identified, contained a statement that the vessel's equipment was working properly at all times.

On October 4, 1992, SMITH was brought before the Master and an entry made in the Log Book to the effect that Third Office SMITH's employment was terminated because he gave inaccurate information to the Master during the operation on October 3rd and thereby causing the allision.

On October 8, 1992, pursuant to the Freedom of Information Act, SMITH requested copies of all investigative material including Coast Guard Form 2692 which had been submitted by Waterman to the Coast Guard authorities.

On July 16, 1993, because his Collective Bargaining Agent failed to acknowledge a grievance, SMITH brought a Complaint in the United States District Court against his employer, Waterman, for a wrongful discharge. Waterman answered and set forth the defense that pursuant to the statutory authority, the Coast Guard had investigated the incident; that it had conducted interviews with the Master, Pilot, Third Mate SMITH, and Chief Mate resulting in the conclusion that the collision was due solely to the fault of petitioner for his failure to give accurate reports.

SMITH's efforts to obtain Coast Guard investigative material were unsuccessful, and the complete record was never made available.

On November 30, 1993, Waterman brought a Motion for Summary Judgment, Or In the Alternative, To Dismiss Pursuant to Rule 12 (e) of the Federal Rules of Civil Procedure. On January 4, 1994, the Coast Guard granted Waterman's Motion For Summary Judgment.

The Court accepted the findings and conclusions of the Coast Guard Investigating Officer which attributed sole

fault for the allision to Petitioner for failure to report correct estimates of distance to the Master and Pilot.

In its Reasons for Judgment, the Court made no reference to any other facts or conditions which may have contributed to the casualty. Petitioner's efforts to obtain the Record of the Coast Guard Investigation were unsuccessful and resulted in a suit by Petitioner against the Coast Guard pursuant to the Freedom of Information Act. In granting judgment against the Coast Guard, the District Court characterized the Coast Guard's action in failing to make the documents and material available as grossly negligent. However, the Court did not order the Coast Guard to produce the records.

The critical aspect of the information contained in the Coast Guard Report was the condition of the ship's machinery and the representation by counsel for the owner, as well as the supervising engineer, that all equipment was operating properly.

In June, 1992, before SMITH went aboard the STONEWALL JACKSON and during the course of Voyage No. 66, problems were experienced with the ship's astern steam throttle valve.

Item No. 4 on the Voyage Repair List included a notation:

> "(b) The astern servo has remained partly opened on several occasions while maneuvering and has had to be closed with a chain fall. Approximately 100 psi of steam pressure was showing on the gauge and steam continued to leak pass the guarding valve when it was closed. The astern servo never closes completely in maneuvering but will close itself while remaining at full sea speed with a higher speed limit oil pressure. Temporary washers were installed on the wrong direction switches on the astern servo to prevent false alarms, remove the washers to enable the switches following repairs..."

At the commencement of Voyage 67, on September 29, 1992, Robert Potter, Waterman's Supervisory Engineer, advised the turbine manufacturer that the astern steam throttle valve continued to stick in the open position thereby causing the problem when maneuvering.

On September 30, 1992, under the supervision of Potter, the linkage between the control mechanism and the astern valve was removed and adjusted. Realignment was completed on October 1, 1992, only 48 hours before the allision.

On October 3, 1992, the turbine manufacturer's representative boarded the STONEWALL JACKSON at Waterman's request to ascertain that the astern steam throttle valve was functioning properly.

As the ship maneuvered back to her berth, the turbine manufacturer's representative noted that the astern steam throttle valve again stuck in the open position. On October 4, 1992, again under the supervision of the manufacturer and Waterman's representatives, the astern steam throttle valve was completely disassembled and inspected. It was discovered that the valve itself was severely worn and required replacement of several parts to restore it to proper working condition. Waterman made the decision to defer repairs and to permit the ship to sail on her voyage because of time constraints. The turbine manufacturer's representative was aboard the ship on October 4, 1992 when the ship sailed.

At the conclusion of Voyage No. 67, problems were still being experienced with the engine throttle control and were reported once again to Waterman's Supervisory Port Engineer in December, 1992.

On December 30, 1992 and January 6, 1992, the astern steam throttle valves were removed from the ship, disassembled, sandblasted and completely repaired. Notwithstanding the long history of problems with the throttle valve, no report of the casualty or repair was made to the United States Coast Guard as required by 46 C.F.R. 4.05-3.

The Coast Guard Office of Marine Safety was advised of possible problems with the STONEWALL JACKSON's

throttle system, and an inquiry was made through Waterman requesting additional information.

In response to the Coast Guard, the Waterman Port Engineer, stated that he had checked the vessel's logs and found no indication of problems with the vessel's engines, even though he was personally involved with repairs and malfunctions of the mechanism over a period of several months during several port calls.

Relying on the Port Engineer's representations, and without further inquiry or investigation by the Coast Guard, determined that the problem did not warrant further action.

REASONS FOR GRANTING THE WRIT

This action is an independent action pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure which provides:

> "...On Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a party's legal responsibilities from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic, which misrepresentation, or other misconduct of an adverse party..."

It is recognized that Rule 60 (b) is an extraordinary remedy and has a significant effect on the desire for finality in litigation. Relief under the rule is reserved for only the most egregious conduct.

In the instant case, the original Coast Guard Form 2692 was not entered in the record, but served as the keystone subsequent of the Coast Guard casualty investigation following the allision. The document was prepared and submitted by counsel for a party, and contained representation that all of the vessel's equipment was

functioning properly. The statement was patently false and known to be false.

Submission of the report resulted in a deliberate misdirection of the investigation, suggesting that the sole cause of the allision was the inaccuracy of Petitioner's distance estimates.

The evidence developed subsequently reinforced the argument that the ship's turbine was not operating properly, and that the Port Engineer falsely represented the operational status of this control mechanism to the Coast Guard Investigating Officer.

In First National Bank of Louisville v. Lustig, 96 F.3d 1554, (CA 5 – 1996) at 1575, the Court determined what misconduct could constitute a fraud on the Court:

> "To establish fraud on the Court, it is necessary to shown an unconscionable plan or scheme which is designed to improperly influence the Court in its decision. Generally speaking, only this most egregious misconduct such as bribery of a judge or member of the jury, or fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the Court. Less egregious misconduct, such as nondisclosure to the Court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the Court..."

Elements which constitute fraud on the Court were also illustrated in Workman v. Bell, 160 F.3d 276, Cert. Den. 121 S. Ct. 1631 , 149 L. Ed. 2d 369:

> "...Elements of fraud on the Court sufficient to allow a grant of relief from judgment are conduct (1) on the part of an officer of the Court (2) that is directed to the judicial machinery itself (3) that is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth (4) that is a positive

averment or is a concealment when one is under a duty to disclose and (5) that deceives the Court..."

Fraud on the Court may occur when an acts of a party prevent his adversary from presenting his case or defense. Abatti v. C.I.R., 859 F.2d 115 (CA 9 – 1984) or constitutes action that prevents a party from fully or fairly presenting his case. M/V Peacock v. Complaint of Edwards, 809 F.2d 1403 (CA 9 – 1987).

In Schultz v. Butcher, 24 F.3d 626, (CA 4 – 1994), the Court found that the owner of a passenger vessel was entitled to a new trial under the rule providing for relief from judgment due to fraud, based on the failure of a pleasure boat operator to provide the owner of the passenger vessel with a Coast Guard investigative report, pursuant to a discovery request. The owner of the passenger vessel boat presented a meritorious defense and the pleasure boat operator was in possession of a Coast Guard report which would have helped bolster the defense of the passenger vessel operator, since it implicated the operator of the pleasure craft.

The report submitted to the Coast Guard which precipitated the Coast Guard investigation, was prepared by Waterman's counsel, who was shielded from discovery by the attorney-client privilege. As a corporate representative, counsel, as well as the Waterman Port Engineer who oversaw the continuing repairs to the Engineering Plant aboard the ship, had knowledge of the condition of the astern steam throttle, which, if disclosed at the outset, would have assisted the Petitioner in the presentation of his case.

The Form 2692 prepared by Waterman's counsel was not made available to Petitioner until he brought suit against the Coast Guard pursuant to the Freedom of Information Act.

The STONEWALL JACKSON was sent to sea with a defective throttle mechanism which rendered the vessel unseaworthy. Sending an unseaworthy vessel to sea is a violation of 46 U.S.C. 10908 and is punishable by five years imprisonment. Concealment of a violation of the statute is punishable as a felony under 18 U.S.C. 4.

In view of the seriousness of the violation, it is submitted that this matter justifies the Petition For Certiorari.

The action of Waterman's counsel, as well as the concealment of mechanical problems with the vessel's astern steam throttle valve, constituted fraud sufficient to justify a new trial under Rule 60 (b).

CONCLUSION

For the reasons identified, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit, and ultimately to vacate and reverse the order below and remand the matter to the District Court for trial.

Respectfully submitted,
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No. 01-30442
SUMMARY CALENDAR

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STUART H. SMITH, JR.
Plaintiff-Appellant,

v.

WATERMAN STEAMSHIP CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

(00-CV- 1878-B)

Filed January 3, 2002

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges. RBYNALDO G. GARZA, Circuit Judge;[1]

In this appeal, we review a district court's denial of a motion to set aside a judgment for fraud upon the court under Rule 60(b) of the Federal Rules of Civil Procedure. For the following reasons, we affirm the decision of the district court.

I

On October 3, 1992, Appellant Stuart H. Smith, Jr., was serving as third mate aboard the S/S Stonewall Jackson, an oceangoing cargo vessel owned and operated by Appellee Waterman Steamship Corporation ("Waterman") and berthed in the Port of New Orleans. On that day, the vessel was attempting an undocking maneuver, during which Smith was assigned to the vessel's stern and was instructed to estimate and report to the bridge the distance from the vessel to the wharf. During the maneuver, the Stonewall Jackson made

contact with the dock, and the allision caused damage to both vessel and dock.

Waterman reported the incident to the Coast Guard, which conducted an investigation. Waterman also submitted to the Coast Guard a Form CG-2692 that briefly described the incident. The Form CG-2692 indicated that all equipment aboard the vessel was in good working order at the time of the accident, but the parties debate whether the astern servo valve was working properly at the time of the accident.[2] After its investigation, the Coast Guard concluded that Smith failed to relay correct distance information to the bridge and that this failure was the primary cause of the allision. On October 4, 1992, Waterman terminated Smiths employment.

On July 16, 1993, Smith sued Waterman for wrongful discharge in the Eastern District of Louisiana. The district court concluded that Smith was employed at will and could be discharged with or without cause. The court further concluded that Smith was not wrongfully discharged and granted Waterman's motion for summary judgment. Smith v. Waterman Steamship Corporation. et al, No. CA-93-3207-I (E.D. La. Jan. 5, 1994). The Form CG-2692 was never submitted to the court, and the court never relied upon it.

Smith then appealed to this Court. For the purposes of his appeal, we assumed arguendo that Smith could only be discharged for just cause but also concluded that no genuine of material issue of fact existed as to whether Smith was wrongfully discharged. Accordingly, we affirmed the decision of the district court. Smith v. Waterman Steamship Corporation, et al, No. 94-30174 (5th Cr. Sept. 8, 1994). The Form CG-2692 was never submitted to this Court, and this Court never relied upon it.

In the present suit, Smith asked the district court to set aside the earlier judgment tinder Rule 60(b), arguing that the Form CG-2692 constituted a "fraud upon the Court" because it state that all equipment aboard the vessel was in good working order at the time of the accident and there is some debate as

to whether the astern servo valve was in such order. R. at 331. The district court concluded that there was no fraud upon the court. The court found that, because the allegedly fraudulent Form CG-2692 was neither submitted to nor relied upon by the district court or this Court in the prior litigation, there was no link between the information allegedly missing from the form and the judgments entered in the earlier lawsuit. Thus, the district court denied Smith's Rule 60(b) motion. Smith appealed.

II

Rule 60(b) of the Federal Rules of Civil Procedure allows a court to set aside a judgment for fraud upon the court. This Court has stated time and again that it will review a district court's Rule 60(b) ruling solely for an abuse of discretion. Harper Macleod Solicitors v. Keaty & Keaty, 260 F.3d 389, 394 (5th Cir. 2001); In re Al Copeland Enterprises, 153 F.3d 268, 271 (5th Cir. 1998); Ergo Sicence v. Martin, 73 F.3d 595, 599 (5th Cir. 1996). Furthermore, when reviewing the denial of a Rule 60(b) motion, this Court does not review the underlying judgment. Halicki Louisiana Casino Cruises, 151 F.3d 465, 470 (5th Cr. 1998); Williams v. Chater, 87 F.3d 702, 705 (5th Cir. 1996); Schewegmann Rank & Trust Co. v. Simmons, 880 F.2d 838, 844 (5th Cir.
1989).

Rule 60(b) provides an extraordinary remedy because it can weaken the principle of finality and "the desire for a judicial process that is predictable." Carter v. Fenner, 136 F.3d 1000, 1007 (5th Cir. 1998) (quoting Bailey v. Ryan Stevedoring Company, Inc., 894 F.2d 157, 160 (5th Cir. 1990)). Thus, Rule 60(b) relief based on fraud upon the court is reserved for only "the most egregious misconduct." Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 872 (5th Cir. 1989). Fraud upon the court is a narrow concept that should include only those types of fraud that do, or attempt to, "defile the court itself," or frauds that are "perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for

adjudication." Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 837 (5th Cir. 1980). In First National Bank v, Lustig, 96 F.3d 1554 (5th Cir. 1996), this Court further described the kinds of misconduct that could constitute a fraud on the court:

> To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision, Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, wilt not ordinarily rise to the level of fraud on the court.

Id. at 1573 (internal quotation marks and citations omitted). The very first test for fraud on the court under Rule 60 is "whether the action in question prevented a party from fully and fairly litigating its ease," Id.

Smith does not, and cannot, complain that there was a nondisclosure to the court of facts allegedly pertinent to the matter before it. He argues that the Form CG-2692 was a fraud upon the court in the prior litigation. As the district court noted below, the Form CG-2692 was never submitted to either the district court or the appellate court in the prior litigation. Therefore, the Form CG-2682 could not have been a nondisclosure to the court.

In essence, Smith complains that there was a nondisclosure to the Coast Guard of facts allegedly pertinent to the matter before the court. Given our decision in First National Bank, such a nondisclosure would constitute a fraud upon the court in only the rarest of circumstances. Even if the facts allegedly omitted from the Form CG-2692 were pertinent to the matter

before the district and appellate courts in the prior litigation, the omission did not prevent Smith from fully and fairly litigating his case. Neither court considered the Form CG-2692. In fact, the form had absolutely no bearing on the district court's earlier conclusion that Smith was employed at will, a conclusion with which this Court took no issue on appeal.[3]

The district court concluded that the link between the alleged nondisclosure on the Form CG-2692 and the judgment entered in the earlier lawsuit was insufficient to establish a fraud on the court. We find no error in the district court's reasoning. We certainly find no abuse of discretion.

III

Accordingly, we AFFIRM the district court's denial of Smith's Rule 60(b) motion to set aside the prior judgment.

Footnotes

[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[2] The astern servo valve can affect the vessel's movement. See Appellant Br. at 7—8.

[3] It should go without saying that a court assuming a point arguendo for the purposes of appeal does not hold on that point. Nonetheless, in his complaint, Smith mischaraeterizes this Court's opinion in the earlier appeal as "noting that the Collective Bargaining Agreement tinder which Smith was employed provided that he could only be discharged for just cause." R. at 326; But see Smith v. Waterman Steamship Corporation, et al., No. 94-30174 (5th Cir. Sept. 8, 1994) ("For purposes of this opinion, we will assume arguendo that the collective bargaining agreement between Smith's union and Waterman is sufficient to invoke 46 U.S.C. § 103 13(c) and

that Smith could only be discharged for just cause.") (emphasis added).

CIVIL ACTION NO. 00-1878
SECTION "I"(B)5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STUART H. SMITH, JR.,
Plaintiff,

VERSUS

WATERMAN STEAMSHIP CORPORATION,
Defendant.

MINUTE ENTRY
January 10, 2001
LEMELLE, J.

Argument was heard this date on defendant Waterman Steamship Corporation's 12(b)(6) Motion To Dismiss And Alternatively Motion For Summary Judgment. For the reasons orally rendered,

IT IS ORDERED that defendant Waterman Steamship Corporation's Motion for Summary Judgment is **GRANTED** dismissing plaintiff's complaint.